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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

18 Civ. 2921 (JMF)

6 UNITED STATES DEPARTMENT OF
7 COMMERCE, et al.,

Argument

8 Defendants.

9
10 -----x
11 NEW YORK IMMIGRATION
12 COALITION, et al.,

13 Plaintiffs,

14 v.

18 Civ. 5025 (JMF)

15 UNITED STATES DEPARTMENT OF
16 COMMERCE, et al.,

Argument

17 Defendants.

18 -----x
19
20 New York, N.Y.
21 July 3, 2018
22 9:30 a.m.

23 Before:

24 HON. JESSE M. FURMAN,

25 District Judge

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APPEARANCES

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiffs

BY: MATTHEW COLANGELO
AJAY P. SAINI
ELENA S. GOLDSTEIN
- and -

ARNOLD & PORTER KAYE SCHOLER
BY: JOHN A. FREEDMAN
- and -

LAW OFFICE OF ROLANDO L. RIOS
BY: ROLANDO L. RIOS

United States Department of Justice
Civil Division, Federal Programs Branch
Attorneys for Defendants

BY: BRETT SHUMATE
KATE BAILEY
JEANNETTE VARGAS
STEPHEN EHRLICH

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(Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini argue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

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1 full scope of such materials. Accordingly, plaintiffs' request
2 for an order directing defendants to complete the
3 Administrative Record is well founded.

4 Finally, I agree with the plaintiffs that there is a
5 solid basis to permit discovery of extra-record evidence in
6 this case. To the extent relevant here, a court may allow
7 discovery beyond the record where "there has been a strong
8 showing in support of a claim of bad faith or improper behavior
9 on the part of agency decision-makers." National Audubon
10 Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without
11 intimating any view on the ultimate issues in this case, I
12 conclude that plaintiffs have made such a showing here for
13 several reasons.

14 First, Secretary Ross's supplemental memorandum of
15 June 21, which I've already discussed, could be read to suggest
16 that the Secretary had already decided to add the citizenship
17 question before he reached out to the Justice Department; that
18 is, that the decision preceded the stated rationale. See, for
19 example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233
20 (E.D.N.Y. 2006) authorizing extra-record discovery where there
21 was evidence that the agency decision-makers had made a
22 decision and, only thereafter took steps "to find acceptable
23 rationales for the decision." Second, the Administrative
24 Record reveals that Secretary Ross overruled senior Census
25 Bureau career staff, who had concluded -- and this is at page

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1 1277 of the record -- that reinstating the citizenship question
2 would be "very costly" and "harm the quality of the census
3 count." Once again, see Tummino, 427 F.Supp. 2d at 231-32,
4 holding that the plaintiffs had made a sufficient showing of
5 bad faith where "senior level personnel overruled the
6 professional staff." Third, plaintiffs' allegations suggest
7 that defendants deviated significantly from standard operating
8 procedures in adding the citizenship question. Specifically,
9 plaintiffs allege that, before adopting changes to the
10 questionnaire, the Census Bureau typically spends considerable
11 resources and time -- in some instances up to ten years --
12 testing the proposed changes. See the amended complaint which
13 is docket no. 85 in the states' case at paragraph 59. Here, by
14 defendants' own admission -- see the amended complaint at
15 paragraph 62 and page 1313 of the Administrative Record --
16 defendants added an entirely new question after substantially
17 less consideration and without any testing at all. Yet again
18 Tummino is instructive. See 427 F.Supp. 2d at 233, citing an
19 "unusual" decision-making process as a basis for extra-record
20 discovery.

21 Finally, plaintiffs have made at least a prima facie
22 showing that Secretary Ross's stated justification for
23 reinstating the citizenship question -- namely, that it is
24 necessary to enforce Section 2 of the Voting Rights Act -- was
25 pretextual. To my knowledge, the Department of Justice and

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1 civil rights groups have never, in 53 years of enforcing
2 Section 2, suggested that citizenship data collected as part of
3 the decennial census, data that is by definition quickly out of
4 date, would be helpful let alone necessary to litigating such
5 claims. See the states case docket no. 187-1 at 14; see also
6 paragraph 97 of the amended complaint. On top of that,
7 plaintiffs' allegations that the current Department of Justice
8 has shown little interest in enforcing the Voting Rights Act
9 casts further doubt on the stated rationale. See paragraph 184
10 of the complaint which is docket no. 1 in the Immigration
11 Coalition case. Defendants may well be right that those
12 allegations are "meaningless absent a comparison of the
13 frequency with which past actions have been brought or data on
14 the number of investigations currently being undertaken," and
15 that plaintiffs may fail "to recognize the possibility that the
16 DOJ's voting-rights investigations might be hindered by a lack
17 of citizenship data." That is page 5 of the government's
18 letter which is docket no. 194 in the states case. But those
19 arguments merely point to and underscore the need to look
20 beyond the Administrative Record.

21 To be clear, I am not today making a finding that
22 Secretary Ross's stated rationale was pretextual -- whether it
23 was or wasn't is a question that I may have to answer if or
24 when I reach the ultimate merits of the issues in these cases.
25 Instead, the question at this stage is merely whether --

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1 assuming the truth of the allegations in their complaints --
2 plaintiffs have made a strong preliminary or prima facie
3 showing that they will find material beyond the Administrative
4 Record indicative of bad faith. See, for example, Ali v.
5 Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For
6 the reasons I've just summarized, I conclude that the
7 plaintiffs have done so.

8 That brings me to the question of scope. On that
9 score, I am mindful that discovery in an APA action, when
10 permitted, "should not transform the litigation into one
11 involving all the liberal discovery available under the federal
12 rules. Rather, the Court must permit only that discovery
13 necessary to effectuate the Court's judicial review; i.e.,
14 review the decision of the agency under Section 706." That is
15 from Ali v. Pompeo at page 4, citing cases. I recognize, of
16 course, that plaintiffs argue that they are independently
17 entitled to discovery in connection with their constitutional
18 claims. I'm inclined to disagree given that the APA itself
19 provides for judicial review of agency action that is "contrary
20 to" the Constitution. See, for example, Chang v. USCIS, 254
21 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if
22 plaintiffs are correct on that score, it is well within my
23 authority under Rule 26 to limit the scope of discovery.

24 Mindful of those admonitions, not to mention the
25 separation of powers principles at stake here, I am not

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1 inclined to allows as much or as broad discovery as the
2 plaintiffs seek, at least in the first instance. First, absent
3 agreement of defendants or leave of Court, of me, I will limit
4 plaintiffs to ten fact depositions. To the extent that
5 plaintiffs seek to take more than that, they will have to make
6 a detailed showing in the form of a letter motion, after
7 conferring with defendants, that the additional deposition or
8 depositions are necessary. Second, again absent agreement of
9 the defendants or leave of Court, I will limit discovery to the
10 Departments of Commerce and Justice. As defendants' own
11 arguments make clear, materials from the Department of Justice
12 are likely to shed light on the motivations for Secretary
13 Ross's decision -- and were arguably constructively considered
14 by him insofar as he has cited the December 2017 letter as the
15 basis for his decision. At this stage, however, I am not
16 persuaded that discovery from other third parties would be
17 necessary or appropriate; to the extent that third parties may
18 have influenced Secretary Ross's decision, one would assume
19 that that influence would be evidenced in Commerce Department
20 materials and witnesses themselves. Further, to the extent
21 that plaintiffs would seek discovery from the White House,
22 including from current and former White House officials, it
23 would create "possible separation of powers issues." That is
24 from page 4 of the slip opinion in the Nielsen order. Third,
25 although I suspect there will be a strong case for allowing a